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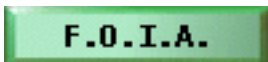
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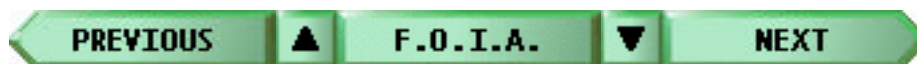


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OBTAINING RECORDS FROM FEDERAL AGENCIES USING FOIA

The Freedom of Information Act: U.S.C.A., Title 5, §552

This guide is intended to be a quick reference for journalists and citizens on the Freedom of Information Act as of February 12, 1996. It does not substitute for research or

consultation with a lawyer on detailed questions. It is intended to address the most common access problems, but can't cover everything.



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1. TARGET AGENCIES

Identify the agency or agencies which may possess the records you seek, as well as responsible officials and/or friendly public servants within each agency. Often, the records you seek may be obtained from more than one federal agency, or from both state and federal agencies. FOIA may be used only for the purposes of obtaining existing records from state agencies (which may be obtained under other laws), or from private companies or persons who receive government contracts.

2. PLAN YOUR FOIA REQUEST

Plan Your FOIA Request. The only information available to you under FOIA are tangible "records" (documents, photographs, maps, computer tapes, etc.) in the possession and control of the agency to whom your request is directed. Know what you want, how much you are willing to spend to get it, and on what bases your request may be denied by the target agency (see list of FOIA exemptions). Also, find out if there is information you can provide to the agency to overcome any potential exemption claims (e.g. signed waivers, a description of data released to other requestors, etc.)



3. ASK INFORMALLY BEFORE INVOKING THE LAW

Think of the FOIA and state public records statutes as supplements to, rather than substitutes for, other means of retrieving government records. Try to find a friendly or sympathetic public official, and ask him or her for copies of the records you seek. If a written letter is requested, try to judge which approach would work best: a direct attack, setting forth the records needed, which lets the agency know that you are aware of your legal rights and intend to enforce them; or a toned-down letter clearly identifying the records you seek, ending with a request that the agency treat the letter as a FOIA request under 5 U.S.C. § 552, as necessary to comply with the request..

4. WRITE TO THE HEAD OF THE AGENCY

Unless you anticipate problems, try and draft the FOIA request letter yourself. (Lawyers are used to drafting legal documents, and their requests often reflect their training. This may result in an expensive and overbroad request). A well-written FOIA letter should identify what you want as clearly as possible; if you know the title or date of a document, who wrote it, the addressee, the office in which it originated, or if portions of the records have already been released to another requester, point this out. The more general your request—e.g. “all files relating to” a particular subject—the more likely the agency’s response to your request will be delayed. It will also be more costly to locate. Do not ask the agency to create a record or list. Always address the letter to the head of the agency or division office (ask ahead where requests should be sent) or its FOIA officer (or send a copy to both). Always date and sign the letter, include a return address, and keep a copy of it (and all other correspondence to and from the agency). Specify if you want information released in a particular manner or in a certain order of priority.

5. LIMIT PRE-AUTHORIZED COSTS

If you want the agency to consult you about search and copying fees before processing your request, state in your request letter that you should be notified if the fee is going to be over a specified amount. It may be possible to avoid high copying costs—but not the search fee—by asking for permission to review the records before having copies made, so that you can select particular documents for copying. Most agencies will only send copies, upon receipt of fees for search, review and copying.

6. REQUEST A WAIVER OF FEES, IF APPLICABLE

If you qualify for a waiver of search, review, or copying fees, ask for a waiver in your FOIA letter. Emphasize that the records sought are not solely for a private, profit-making purpose. If you are a media representative, or an “educational or non-commercial scientific” entity, send along proof of this fact with your request letter. Otherwise, explain in your letter how the

requested records will “contribute significantly to the public understanding of the operations or activities of the Government.”



7. ANTICIPATE DELAYS, DELAYS AND MORE

DELAYS

Technically, government agencies are required to respond to your request within 10 working days, unless they qualify for an additional 10 working days in “unusual circumstances” (e.g., the request is voluminous, the request requires the agency to search/collect records from separate offices, or the agency needs to consult other agencies). However, an agency’s “timely response” may simply be an acknowledgment that your request has been received and is being processed, or that a search for the records is under way, or that fees are being calculated.

In practice, many agencies take much longer than 10 days to release records—in fact, agencies such as the FBI, CIA or State Department can take months, and sometimes, years, to fully respond to a request. While an agency’s failure to timely respond violates FOIA, some courts have ruled that delay is permitted under FOIA so long as the agency treats each request sequentially on a first-come, first-served basis. If you have an overriding and pressing need for a record, state this in your letter, and ask the agency to move you request up in line.

In other circumstances, write or call the agency or its FOIA officer and try to get them to commit to a release date within, say, four to eight weeks. Once you settle on a release date, inform the agency that there is no action by this date, you will interpret their inaction or “non-denial” as an outright denial and you will appeal. (See FOIA Administrative Appeal Procedures).

8. ANSWER QUESTIONS AND DOCUMENT EVERYTHING

If the agency informs you that your description of records is inadequate, or that the materials do not exist, send a follow up letter which more accurately identifies the records you seek or narrows the scope of the request. Or, send along news reports, court records, or other items you may have which describe the records more fully. If you follow up your initial request with a phone call, always take detailed notes on what was said, to whom you spoke, and the date of these conversations. It is useful to confirm all phone calls with a letter addressed to the official to whom you spoke which states that you are writing to confirm the substance of your phone conversation of that data. In your letter, restate any agreements, time schedules, definitions, fees, etc., which were discussed. In any follow-up with the agency, reference the date of your initial request or its assigned identification number. Keep copies of all correspondence to and from the agency.



CLAIMS)

9. PURSUE YOUR REQUEST (DESPITE EXEMPTION

Don't let Exemption Claims Stop You from Pursuing your FOIA Request. The FOIA contains several bases upon which the agency may deny your FOIA request. Generally, this will be the biggest stumbling block to obtaining the records you seek. In the case of DENIAL on the basis of one or more of the statutory exemptions, remember:

- D = Discretionary. The exemptions are not mandatory; an agency is not required to withhold information simply because one of the exemptions can be interpreted to apply to your request. Unless some other statute specifically limits/prohibits disclosure, the agency can choose to waive the exemption and release the records to you.
- E = Explanation. The agency cannot simply assert an exemption ; it must explain why the exemption applies to any particular information requested.
- N = Narrow Application. The exemptions must be narrowly applied.
- I = Isolate Exempt Materials. The agency cannot deny access to the entire record because some portion of it is exempt; it must release any non-exempt material which is "reasonably segregable" from the exempt portions.
- A = Appeal. You can contest any exemption claimed by appealing to higher agency officials.
- L = Lawsuit. If all else fails, you can file a lawsuit to compel release of the requested records; the court will conduct a full review of each of the agency's exemption claims and the agency bears the full burden of justifying its denial of the request.

Of course, you need to be familiar with the FOIA exemptions, so that you can argue your right to the information. The following is a listing of the nine exemptions contained in 5 U.S.C. § 552(b); however, agency and court interpretation of the listed exemptions is generally complex and often novel, and you will need to consult the statute, prior case law, and other reference documents to learn more about how a particular exemption may be applied to your request:

1. Properly 'classified' records the disclosure of which "reasonably could be expected to cause damage to national security." Such records, if in fact properly classified in accordance with substantive and procedural requirements specified by and Executive Order are per se exempt from mandatory disclosure. Note that courts will generally defer to the agency's classification, and will generally uphold the agency's decision to "neither confirm nor deny" the existence of requested records where disclosure of the records' mere existence may harm national security (e.g., records of military accidents involving nuclear materials may jeopardize national security interest in keeping location of nuclear weapons secret.).
2. Records "related solely to the internal personnel rules and practices of the agency. This exemption may be applied only to minor and routine records of no reasonable interest to the public at large (e.g. record keeping directions,

materials outlining work assignments, internal time deadlines and procedures, agency employees' home addresses, etc.).

3. Records that are "specifically exempted from disclosure by statute."
The governing statute must be other than FOIA and must either explicitly state that certain records are not to be disclosed, or must set forth criteria for withholding certain types of records. This may exempt from disclosure, e.g., patent data, financial disclosure records, sensitive Census data, etc.
4. Records containing "trade secrets and commercial or financial information" obtained from a person by the agency in confidence. Note that records generated by the government—e.g., computer model created by the agency—are not exempt from disclosure under this section (but may be exempt under (b)(5)).
5. Records of inter- and intra-agency memoranda or correspondence which are privileged by law. This is one of the more complex of the FOIA exemptions. Included in its scope are records covered by "executive privilege" (protecting the advisory, consultative, deliberative and decision-making opinions of the agency), which may extend to drafts of records, as well as records covered by "attorney-client" or "attorney work-product" privilege (protecting confidential communications between agency and its counsel, and records prepared by the agency's attorney in anticipation of litigation, where disclosure would reveal the attorney's litigation strategy).
6. Records of "personnel, medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." To fall within this exemption, the records must contain information pertaining to a specific individual (and the identifying features cannot be removed by excision of the person's name) and the threat must be real, not speculative.
7. Records or information compiled for law enforcement purposes, the disclosure of which would hamper enforcement efforts and/or trial proceedings, endanger human life, disclose confidential sources, or constitute an unwarranted invasion of privacy. Note that records originally compiled for law enforcement purposes do not lose exemption (7) protection when reproduced or summarized in a separate document compiled for some other purpose. Note, too, that records originally compiled for some other purpose may nevertheless qualify for protection under this exemption if subsequently assembled for law enforcement purposes, or otherwise incorporated into a law enforcement file.
8. Records that are "contained in or related to examination, operating, or conditional reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." For example, bank examination reports prepared by federal bank examiners (and records relating to such examination— complaints, findings, etc.) may be withheld from the public.
9. Records of "geological and geophysical information and data, including maps, concerning oil well." While this near "blanket" exemption for oil well information is rarely invoked, courts have held that it applies only to well information of a technical or scientific nature.

Recently, §552© was added to exclude certain law enforcement investigative records, informant records and classified FBI documents for the FOIA. The exclusion acts to shield records of ongoing investigations by excluding them from the FOIA mandates altogether if the agency has reason to believe that disclosure would in any way harm the

investigation. The exclusion is so broad that it allows the federal agency to treat such records as if they don't exist, thereby engendering a "no responsive record" response to your request.



10. BE PATIENT, BE PERSISTENT

Attempt informal resolution of any problems that may arise. If necessary, offer to "revise" or "narrow" the scope of your request, ensuring that revisions will not be treated by the agency as "new" requests. If the agency claims the records don't exist, and you believe that they do, ask what search methodology or techniques the agency used in its attempt to locate responsive records—are there any search "clues" you can provide? Resolve fee and fee waiver issues, whenever possible. Track all time and response deadlines carefully. Whatever the cause of an agency's delay in providing records, don't hesitate to inquire about the status of your request, or about the agency's filing, search and/or retrieval procedures in general. If your follow-up inquiries are being ignored, send an appeal letter (see Administrative Appeal Procedures): Under FOIA, any excessive delay in complying with a FOIA request constitutes a "denial in effect" and is grounds for an appeal.

11. TAKE ADVANTAGE OF FOIA'S APPEAL PROCEDURES

Always Take Advantage of the FOIA's Administrative Appeal Procedures. When obstacles arise that can't be resolved, take advantage of the FOIA's appeal procedures and send an appeal to higher officials. Appeal letters can be used to challenge: (a) the agency's failure to timely respond; (b) the agency's decision not to release records; (c) the adequacy of the search methodology used by the agency to locate responsive records; and (d) the agency's decision not to grant you a fee waiver. If an agency has denied your request in whole or in part, you must appeal before seeking help from the courts. In other circumstances, an appeal letter subjects your request to a different level of scrutiny by more knowledgeable senior officials, and puts the agency on notice that you are one step closer to filing a lawsuit. When writing your appeal letter, cite paragraph 552(a)(6) of the FOIA and state the grounds for appeal. State that you expect a final ruling on your appeal within 20 working days, the time limit specified in the statute. You may want to consider whether it would be helpful to have a lawyer write the appeal letter; generally, a lawyer familiar with FOIA will be in a good position to rebut specific exemption claims. A letter signed by a lawyer will also emphasize that you are serious about pursuing your request in court, if necessary.



12. CONSIDER FILING A LAWSUIT

Consider Filing a Lawsuit to Force the Agency to Release Records. If all else fails, you may wish to file a lawsuit compelling the agency to release the records to you. If you elect this course, remember that you must file the lawsuit within six years from the date of your initial request letter, even if you receive no response or an incomplete response from the agency (if you request is for records about you and was made under the Privacy Act, you have only two years to tile you lawsuit). It is always best to find an attorney to represent you. FOIA lawsuits usually involve complex, highly technical interpretations of the law, and may take a year or more to complete. An experienced attorney may be more efficient than you in moving your case along quickly, minimizing the stress of litigation, and saving you tremendous amounts of time and money.

Of course, most lawyers expect to get paid for their work. Some private and non-profit law firms, public interest groups, and law schools may agree to take your case on a pro bono (free) or low cost (reduced fee) basis. However you may remain responsible for paying various out-of-pocket expenses (filing fees, mail, fax and phone services, photocopy costs, clerical salaries, transcripts, etc.) -- this often true even if the attorney agrees to represent you on a pro bono basis and, in some states, the law Requires that the client, and not the lawyer, pay these costs. The attorney you select should be in a good position to tell you what the legal costs may be. Now the good news: FOIA permits the judge to order the agency to pay attorneys' fees and reimburse out-of-pocket costs if you win the release of a significant portion of the records which were withheld, or if the court finds that the agency failed to comply with some other requirement of the FOIA. Thus, even if you can't afford to pay hourly attorney fee rates, an attorney will often be encourage to take your case on a pro-bono or low costs basis if he or she understands that his or her attorneys' fees will be paid by the agency if you win.

PREVIOUS



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